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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of) MM Docket No. 98-198
)
Amendment of Section 73.202(b)) RM-
Table of Allotments)
FM Broadcast Stations)
(Cross Plains, Texas))

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**MOTION TO STRIKE
UNAUTHORIZED "STATEMENT FOR THE RECORD"
AS FILED BY
WBAP/KSCS OPERATING, LTD. AND BLUE BONNET RADIO, INC**

By Notice of Proposed Rulemaking ("NPR") issued by the Commission in the above-captioned proceeding on October 30, 1998 (DA 98-2188), the Commission invited Comments and Reply Comments in that proceeding, to be filed on December 21, 1998 and January 5, 1999, respectively. On the specified date, Reply Comments were filed by (among others) WBAP/KSCS Operating, Ltd. and Blue Bonnet Radio, Inc. (hereinafter "WBAP-BBR") and Gulfwest Broadcasting Company, licensee of radio station KVCQ(FM) Cuero, Texas, along with Sonoma Media Corporation, proposed Assignee of KVCQ(FM), (hereinafter referred to jointly as "Gulf-Sonoma").

Among the defects noted in Reply Comments by Gulf-Sonoma in the WBAP-BBR proposal was the fatal omission by WBAP-BBR to include a firm commitment by Blue Bonnet Radio, Inc, licensee of radio station KEMM(FM), to construct a station on the new allocation requested in Allen, Texas, if the allocation were adopted as requested (Gulf-Sonoma Reply Comments @ page 9). As

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noted there, Gulf-Sonoma argued that, absent that commitment, the proposal of WBAP-BBR was defective and should receive no further consideration in this proceeding.

Fifteen days after the Reply Comment date had expired, WBAP-BBR on January 20, 1999 filed what it styled as a "Statement for the Record" where it not only attempted to patch over the fatal defect in its own proposal but, at the same time, took the occasion to advance further attacks upon Gulf-Sonoma as well as other parties in this proceeding. The "Statement For the Record" is a totally unauthorized pleading, disruptive of this proceeding and prejudicial to the rights and expectations of every other party, as well as the Commission itself, to a fair proceeding with pleadings and proposals complete and final at the time they are required to be complete and final. For these reasons, as more fully set forth below, Gulf-Sonoma moves the Commission to strike the unauthorized "Statement For The Record" as filed by WBAP-BBR and to give it no consideration whatsoever in this proceeding.

**I. The WBAP-BBR Pleading is Unauthorized and Included
No Motion For Leave to File Such an Unauthorized Pleading.**

Given the fact that we are dealing here with a proponent of some sophistication which is also represented by competent counsel, it is somewhat beyond presumptuous and bordering upon arrogance for WBAP-BBR to simply file this additional pleading now as if it had some unspecified "right" to do so. We have reviewed the NPR and note its admonishment to all interested parties to "read the Appendix" which describes the procedures applicable to this proceeding and specifies two filings for ALL

parties, viz. Comments and Reply Comments, and nothing else. We have reviewed the Commission's rules applicable to rulemaking proceedings and find no provision for a "Statement for The Record" for any party to file after Reply Pleadings. We are aware of no Statute of Jeofaile applicable to FCC proceedings to allow parties to "fix up", at their option and leisure, deficiencies in authorized pleadings that had been filed. In fact, the converse is true: Section 1.415(d) specifically states that

No additional comments may be filed unless specifically requested or authorized by the Commission.

Even in the case of pro se applicants, the Commission has charged them with knowledge and compliance with the FCC's rules, Gray-Schwartz Broadcasting, 44 RR 2d 1033 (ALJ 1978), See also Classic Vision, Inc., 1 FCC Rcd 1109, 1110 n.2 (Rev. Bd 1986) and Hillebrand Broadcasting, Inc., 1 FCC Rcd 419 (1986). Beyond that, it is well established Commission policy to not allow such additional pleadings as offered here by WBAP-BBR absent "the most compelling and unusual circumstances", D.H. Overmeyer Communications Co., 4 FCC 2d 496, 505 (Rev. Bd. 1966); KAYE Broadcasters, Inc., 47 FCC 2d 360, 361 n.4 (1974). See also generally the discussions in Filing of Supplemental Pleadings Before the Review Board, 40 FCC 2d 1026 (1972) and Adjudicatory Regulation, 58 FCC 2d 865, 876 (1976).

There is simply no excuse in the present case for WBAP-BBR to not have made all the "statements for the record" that it wished to make as part of its own Reply pleadings. That, in fact,

is the expected and appropriate vehicle for all statements for the record, by all parties.

In this circumstance and with WBAP-BBR submitting a pleading that not only seeks to cure its own fatal defect but also to add further disparaging comments directed to Gulf-Sonoma as well as other parties in this proceeding, we find it nothing less than extraordinary that it would propose to do so without even attempting to make a "good cause" showing in a properly filed Motion for Leave to File such a pleading. Then again, in the clear and obvious absence of any good cause that could possibly justify the filing of such additional comments, perhaps it is more understandable, if not more acceptable. In addition, we do not think their case is helped at all by their recognition in footnote one that they are seeking to respond to Reply Comments but that they have simply chosen not to seek leave to do so. Their failure to do so is "explained" by their own self-serving conclusion that "clarification is appropriate". 1/ Having so decided, WBAP-BBR then magnanimously condescends to agree that if the Commission determines that it really must grant leave to accept the "clarification", then, oh all right, they will say they seek leave to file this statement. No good cause shown, no anything, just a grudging agreement that they will let the Commission grant them leave to file, based upon nothing. Is something not seriously amiss here?

1/ Even if this self-serving bootstrap claim were accepted (which we do not believe it could be), the "clarification" of its own defects would hardly extend to its additional attacks upon the other parties.

WBAP-BBR did not file a Motion for Leave to File an extra pleading, it did not make any good cause showing whatsoever, and its proposed "Statement for the Record" consisting of additional representations to shore up its own case, as well as additional substantive attacks upon other parties in this proceeding is wholly improper, unfair, and prejudicial to the rights of every party and to the Commission itself and should be rejected out-of-hand as improper and unacceptable and given no consideration in this case.

**II. The Additional Arguments Submitted in
the "Statement For the Record"**

Having said as much, Gulf-Sonoma is now left in a position, as is always the case (and is one of the main reasons why such additional pleadings are found to be so pernicious and disruptive) that it must respond to the new arguments raised by WBAP-BBR. It will do so here as quickly as possible.

1. The failure to Include the Licensee Commitment

As to the failure of WBAP-BBR to include the required commitment of the licensee of KEMM to build a station at Allen, Texas, as requested, the commitment was not timely included in their Counterproposal as required (a fact implicitly admitted by the attempt by WBAP-BBR to 'add it in' now in their late-filed "Statement for the Record") and may not be 'added in' now. It is too late.

As for the statement itself, as indicated on page 9 of the Reply Comments filed by Gulf-Sonoma, the Commitment actually offered by WBAP-BBR in its Counterproposal relates only to that

of WBAP and **NOT** to Blue Bonnet Radio, the licensee of KEMM. The statement is that WBAP and BBR both agree that if the proposal is adopted, that WBAP [**NOT BBR**] will commit to build.

Put another way: Licensee and Speculator agree together that if the proposal is adopted, Speculator will commit to build.

This is simply and patently insufficient to meet the Commission's requirements that the LICENSEE include its own commitment to build. That is essential and that was omitted. Nor is it difficult to see why the commitment of the licensee is a required element of any such proposal. If the licensee commits, it is, and remains, under FCC jurisdiction to be held to that commitment. Conversely, a speculator remains free and completely outside FCC jurisdiction in this proceeding to decide to quit or move on at any time it chooses to, depending upon changes in economic market conditions, personal changes, changes in the FM broadcasting industry, or anything else good and sufficient to the speculator. Absent a commitment to change channels or implement the proposal by the LICENSEE, the LICENSEE is under no obligation to do so, leaving the Commission in the unacceptable position of being asked to make enormous major changes in the FM Table of Allocations with no guarantee that it will ever be implemented, exposing it to an unacceptable waste of time and money for the Commission as well as the taxpayers.

Moreover, the suggestion by WBAP-BBR that the agreement of the licensee to reimburse various stations making changes as being 'almost the same as a commitment to construct' is illusory

and patently absurd. If the speculator decides, for whatever reason, not to follow through on this proposal, and the licensee is not committed to do so, the proposal would never be implemented and there would be no costs to "reimburse" since no one would move. It does not cure the fatal inherent defect of the licensee's omission.

2. Other Claims in the "Statement For the Record"

As to the various other matters raised and argued in the WBAP-BBR pleading, we note with awe that they choose to call the Commission's attention to the fact that Alalatex, the original petitioner, "failed to file its expression of interest" and therefore should no longer be considered as a "conflicting proposal". If WBAP-BBR is allowed to add a new 'commitment to build' in its own "Statement for the Record", should not Alalatex be afforded the same opportunity? It is amazing that WBAP-BBR could argue to "fix' its own deficiency and failure, while at the very same time, in the very same pleading, arguing that the rule requires strict recognition of such a failure for another petitioner in the same proceeding.

Lastly, WBAP-BBR again refers to the "numerous defects" they claim in the Counterproposal of Gulf-Sonoma, as if repetition would somehow make it so. Suffice it to say that Gulf-Sonoma believes that its Counterproposal was more than sufficient to fully apprise everyone of what it proposed to do and why it proposed to do it. Upon issuance of a Further Notice of Proposed Rulemaking, Gulf-Sonoma is fully prepared to supply any and all

further factual data as may be requested. In addition, to the extent that WBAP-BBR suggests that there is no other acceptable conflicting proposal to be considered or compared to their own, they are sadly mistaken. The Counterproposal by Gulf-Sonoma includes categorical proposals and commitments by Gulf-Sonoma to apply for and build on channel 272C1 in Cross Plains, as well as the commitment to build on the upgraded channel 249C2 moved from Cuero to Luling and the replacement channel 280A in Cuero, and that these independent and non-contingent commitments provide a substantial choice to the commission in this proceeding, most especially in comparison to the extraordinary and disruptive proposals advanced by WBAP-BBR and by its companion proposal by First Broadcasting Management.

Finally, as to the alleged defect of Gulf-Sonoma most relied upon by WBAP-BBR, the loss of a voluntary commitment to a channel change by Equicom at San Saba, we have discussed this at page 11 of our Reply Comments and simply note again here that the Commission specifically provided in Columbus (59 RR 2d 1185 (1986)) for the consideration of "special factors" in determining if more than two "involuntary" channel changes should be accommodated and that is exactly what it should do here. Attempts to destroy the competition and preclude any choices for the Commission by exerting pressure on broadcast licensees to deal only with them and to forbid cooperation by the licensee with any other party is no more acceptable in this context than it would be for a party controlling the only transmitter site for a proposed station. Removing the competition by this artificial

simple expedient of simply gaining control of the necessary site and excluding every other applicant has already been held to be an unacceptable anti-competitive practice, and contrary to the public interest. 2/ No less should hold true here.

It should also be recognized by the Commission that Equicom was fully agreeable to the channel change proposed by Gulf-Sonoma and the only reason it withdrew its written commitment on that point was under duress in the face of threats and pressure from WBAP-BBR to do so. Clearly, If the Commission finds in favor of Gulf-Sonoma's proposal, both WBAP-BBR and First Broadcasting would be dismissed from the case, again leaving Equicom free to do what it has already indicated it would do, i.e. fully cooperate in the channel change proposed by Gulf-Sonoma, and in the context of what has happened here, it is reasonable and fair for the Commission to recognize that fact.

Lastly, we submit that an essential part of any analyses of Equicom's withdrawal of its written commitment to Gulf-Sonoma as included in Gulf-Sonoma's Counterproposal with Equicom's permission, would be a full and complete determination and evaluation of exactly what was said to Equicom by WBAP-BBR or

2/ See for example, In re Allocation of Channel in Oak Beach and Bay Shore, New York, MM Docket 84-293, March 14, 1985 "...while we recognize that the owner of a potential ...site...can...selectively refuse to make such site available to [other] potential licensees, the Commission will not...look favorably upon circumstances that effectively preclude more than one party from filing an application." See also FCC Rule 73.239 which indicates that no license will be granted or renewed to any person where the exclusive use of that site by an applicant would unduly limit or restrict its competition at that site.

First Management, or their agents, that was sufficient to "convince" Equicom to accede to their demands that Equicom withdraw its written agreement with Gulf-Sonoma, and whether any such actions, or forbearance of such actions, constitute reportable "consideration" for Equicom's actions.

III. Conclusion

Wherefore, it is respectfully submitted that the "Statement for the Record" as submitted by WBAP-BBR is a totally unauthorized pleading, with no good cause shown as to why the Commission should entertain the extraordinary step of allowing or considering such a pleading, and that, for the reasons stated herein, the "Statement For The Record" should be rejected and dismissed, and given no further consideration in this proceeding.

Respectfully Submitted,

GULFWEST BROADCASTING COMPANY

by 

Robert J. Buenzle, Counsel

SONOMA MEDIA CORPORATION

by 

Robert J. Buenzle, Counsel

Law Offices of Robert J. Buenzle
12110 Sunset Hills Road
Suite 450
Reston, Virginia 20190-3223
(703) 715-3006

January 29, 1999

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing "Motion to Strike Unauthorized 'Statement For The Record' As Filed By WBAP/KSCS Operating, Ltd. and Blue Bonnet Radio, Inc." have been served by United States mail, postage prepaid this 29th day of January, 1999, upon the following:

John A. Karousos, Esq.
Chief, Allocations Branch
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W.
Suite 500
Washington, D.C. 20554

Alalatex Broadcasters
Jean Hill, Partner
6101 Bayou Road
Mobile, Alabama 36605

Equicom, Inc.
Radio Station KBAL (FM)
1240 Villa Maria
Bryan, Texas 77802

Watts Communications, Inc
Radio Station KXYL
1 Texas Avenue
Brownwood, Texas 76801

Living World Church of Brownwood, Inc.
Radio Station KPSM
P.O. Box 1522
Brownwood, Texas 76804

Anne Goodwin Crump, Esq.
Fletcher Heald & Hildreth, P.L.C.
1300 North 17th Street
11th Floor
Rosslyn, Virginia 22209
Counsel for Jason Fritz

Lee J. Peltzman, Esq.
Shainis & Peltzman, Chartered
1901 L Street, N. W.
Suite 290
Washington, D.C. 20036
Counsel for BK Radio

John J. Mcveigh, Esq.
Attorney At Law
12101 Blue Paper Trail
Columbia, Md 21044-2787
Counsel for FoxCom, Inc.

Cowboys Broadcasting, L.L.C.
Station KVMX
1110 S. Santa Fe Trail
Duncanville, Texas 75137

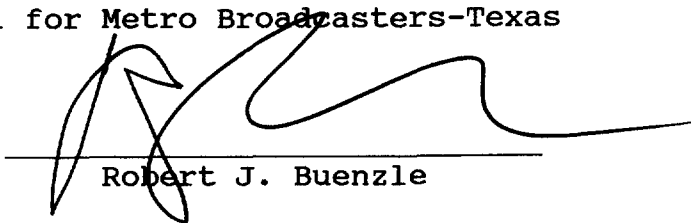
Mark N. Lipp, Esq.
J. Thomas Nolan, Esq.
Shook, Hardy & Bacon, LLP
1850 K Street, N.W.
Suite 900
Washington, D.C. 20006
Counsel for First Broadcasting
Counsel for WBAP/KSCS Operating
and Blue Bonnet Radio, Inc.
Counsel for Hunt Broadcasting

Matthew H. McCormick, Esq.
Reddy Begley & McCormick
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20037
Counsel for Gain-Air, Inc.

Roy R. Russo, Esq.
Lawrence N. Cohn, Esq.
Cohn & Marks
1920 N street N. W.
suite 300
Washington, D.C. 20036
Counsel for KCYT-FM License
Counsel for Heftel Broadcasting

Robert W. Healy, Esq.
Smithwick & Belendiuk
1990 M street N.W.
Suite 510
Washington, D.C. 20036
Counsel for Jerry Snyder & Assoc.

Harry C. Martin, Esq.
Fletcher Heald & Hildreth
1300 North 17th Street
11th Floor
Rosslyn, Va 22209-3801
Counsel for Metro Broadcasters-Texas



Robert J. Buenzle